LEGISLATIVE SERVICES AGENCY

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In This Edition

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November 2012

Sun	Mon	Tue	Wed	Thu	Fri	Sat
				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19	20	21	22	23	24
25	26	27	28	29	30	

December 2012

Sun	Mon	Tue	Wed	Thu	Fri	Sat
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

Tuesday, December 11, 2012
Administrative Rules Review Committee
9:00 a.m., Room 116, Statehouse

Property Assessment Appeal Board Review Committee
1:00 p.m., Room 22, Statehouse

Wednesday, December 12, 2012
Legislative Tax Expenditure Committee
10:00 a.m., Room 103, Supreme Court Chamber, Statehouse

Revenue Estimating Conference
10:00 a.m., Room 116, Statehouse

Tuesday, December 18, 2012
Mental Health and Disability Services Redesign Fiscal Viability Study Committee
10:00 a.m., Room 103, Supreme Court Chamber, Statehouse

Thursday, December 20, 2012
Legislative Fiscal Committee
10:00 a.m., Room 116, Statehouse

Friday, December 21, 2012—TENTATIVE
Electronic Commerce Study Committee
10:00 a.m., Room 103, Supreme Court Chamber, Statehouse

Administrative Rules Review Committee
Chairperson: Senator Wally Horn
Vice Chairperson: Representative Dawn Pettengill
Location: Room 116, Statehouse
Date & Time: Tuesday, December 11, 2012, 9:00 a.m.
Contact Persons: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.
Agenda: Published in the Iowa Administrative Bulletin:
http://www.legis.state.ia.us/aspx/BulletinSupplement/bulletinListing.aspx

Property Assessment Appeal Board Review Committee
Co-Chairperson: Senator Joe Bolkcom
Co-Chairperson: Representative Tom Sands
Location: Room 22, Statehouse
Date & Time: Tuesday, December 11, 2012, 1:00 p.m.
Contact Persons: Michael Mertens, Legal Services, (515) 281-3444; Michael Duster, Legal Services, (515) 281-4800.
Agenda: To be announced.
Internet Page: https://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=851

Legislative Tax Expenditure Committee
Co-Chairperson: Senator Joe Bolkcom
Co-Chairperson: Representative Tom Sands
Location: Room 103, Supreme Court Chamber, Statehouse
Date & Time: Wednesday, December 12, 2012, 10:00 a.m.
Contact Persons: Michael Duster, Legal Services, (515) 281-4800; Mike Mertens, Legal Services, (515) 281-3444.
Agenda: To be announced.
Internet Page: https://www.legis.iowa.gov/Schedules/committee.aspx?cid=511

Mental Health and Disability Services Redesign Fiscal Viability Study Committee
Co-Chairperson: Senator Joe Bolkcom
Co-Chairperson: Representative Renee Schulte
Location: Room 103, Supreme Court Chamber, Statehouse
Date & Time: Tuesday, December 18, 2012, 10:00 a.m.
Contact Persons: John Pollak, Legal Services, (515) 281-3818; Amber DeSmet, Legal Services, (515) 281-3745.
Agenda: To be announced.
Internet Page: https://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=849

Legislative Fiscal Committee
Co-Chairperson: Senator Robert Dvorsky
Co-Chairperson: Representative Scott Raecker
Location: Room 116, Statehouse
Date & Time: Thursday, December 20, 2012, 10:00 a.m.
Contact Persons: Dave Reynolds, Fiscal Services (515) 281-6934; Deb Kozel, Fiscal Services, (515) 281-6767.
Agenda: To be announced.
Internet Page: https://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=46

Electronic Commerce Study Committee—TENTATIVE
Co-Chairperson: Senator Matt McCoy
Co-Chairperson: Representative Chuck Soderberg
Location: Room 103, Supreme Court Chamber, Statehouse
Date & Time: Friday, December 21, 2012, 10:00 a.m.
Contact Persons: Rick Nelson, Legal Services, (515) 242-5822; Ann Ver Heul, Legal Services, (515) 281-3837; Mike Mertens, Legal Services, (515) 281-3444.
Agenda: To be announced.
Internet Page: https://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=850

ADMINISTRATIVE RULES REVIEW COMMITTEE
November 13, 2012

Chairperson: Senator Wally Horn
Vice Chairperson: Representative Dawn Pettengill

DEPARTMENT OF ADMINISTRATIVE SERVICES (DAS), *Human Resources Enterprise*, 10/17/12 IAB, ARC 0401C, ADOPTED.

Background. This rulemaking is part of the department's ongoing comprehensive review of its existing rules. This portion of the review relates to the Human Resources Enterprise within DAS. Items under notice relating to the Information Technology Enterprise (ITE) were not adopted; the department will revisit the ITE rules at a later date. Changes made in this rulemaking include amending certain definitions to reflect existing statutes, eliminating unnecessary terms, and making various technical and grammatical changes.

Commentary. A representative of the department summarized the rulemaking and noted various changes made since the rulemaking was put on notice. Committee members expressed concern about language in items 44-46 of the rulemaking which provide that an employee may be subject to a reduction in force before an employee with fewer retention points if the employee with greater retention points received a rating of less than "meets expectations" on their most recent performance review or had a disciplinary suspension or demotion within the last 12 months. Approval of the director of DAS would be required for such an action.

Some committee members expressed concern that "meets expectations" is not defined in the rule and that a supervisor might use this process to wrongfully target and remove a long-time employee based on a single performance review. Committee members stated that the retention point system is meant as a form of job protection, and these provisions would undermine it. The representative explained that employees would be protected from such a scenario because "meets expectations" would be based on a preexisting point system used for performance reviews, and performance reviews are subject to a grievance process before the Public Employment Relations Board. The representative emphasized that this process could occur only during a reduction in force and is not mandatory even then, and can only occur with the approval of the director of DAS. The representative also noted that no public comments had been received about this provision. Committee members suggested that the lack of public comment may be due to this change being only one small part of a large and technical rulemaking. Committee members also questioned whether it was appropriate to include a policy change such as this in a rulemaking which is mainly technical in nature. Other committee members expressed support for these provisions, stating that they would allow a supervisor to retain the best employees during a reduction in force, instead of being forced to retain an ineffective employee over an effective one. It was noted that these provisions would apply to both new and current employees, although they would not apply to employees subject to collective bargaining. A motion was made to delay the effective date of items 44-46 until the adjournment of the next session of the General Assembly. The motion failed.

Action. No action taken.

IOWA FINANCE AUTHORITY (IFA), *Qualified Allocation Plan,* 10/31/12 IAB, ARC 0427C, ADOPTED.

Background. These rules were initially reviewed by the committee in October. The federal government established the Low-Income Housing Tax Credit program in 1986. IFA is the state agency which allocates these housing tax credits in Iowa. Each year the program is revised; the federal Internal Revenue Service (IRS) annually allocates housing tax credits on a per capita basis to each state based on population.

Commentary. For 2012, IFA's per capita tax credit authority was $6,549,663. Returned tax credits from previous tax credit years may also be available for allocation. These tax credits provide a dollar-for-dollar reduction to an investor's tax liability on ordinary income. Developers of affordable housing sell the housing tax credits to investors as a way to finance the projects and keep rents low for eventual tenants. The IRS oversees the program on the federal level and provides general guidelines for it.

IFA also sets its own rules that are included in a Qualified Allocation Plan (QAP), which is annually updated. A portion of the credits are reserved for five set-asides: Nonprofit (10 percent), Community Housing Development Organization (5 percent), Preservation (10 percent), Rural (10 percent), and Rural Development Preservation Demonstration (returned credits). A developer may submit as many projects as the developer chooses; however, IFA will not allocate more than $1,200,000 in tax credits to projects being developed by a single developer.

Action. No action taken.

PAROLE BOARD, *Voting Requirements,* 10/31/12 IAB, ARC 0421C, ADOPTED.

Background. Iowa Code §904A.4 states that the board shall interview and consider inmates for parole and work re-

(Administrative Rules Review Committee continued from Page 3)

lease. The statute provides that a majority vote of the members is required to grant a parole or work release. The board is made up of two full-time members and three part-time members. Board procedures provide for inmate interviews by three member panels, following various types of evaluation. All five members of the board must vote in favor of parole.

Commentary. This amendment would require the votes of only three members to grant a parole. The chairperson of the board stated that new evaluations provides greater security that an inmate is an appropriate candidate for parole. The chairperson also stated that in over 99 percent of the past cases the decisions were unanimous. The chairperson noted that the three-member vote was set out in the statute itself and that under the current process two of the voting members did not participate in the interview.

Several members of the public expressed concern that the new rules would make parole easier to attain and would return dangerous criminals to communities. Committee members shared these concerns; the board chairperson assured the members the reviews will remain thorough and the standards will remain high.

Action. No action taken. Rule is final.

PROFESSIONAL LICENSURE DIVISION, *Cosmetology Salons,* 10/31/12 IAB, ARC 0437C, NOTICE.

Background. The division proposes a rewrite of existing rules setting physical standards for schools of cosmetology. Generally, the rewrite establishes the prescribed minimum physical and equipment requirements; it also reduces the number of instructors required if the school is offering only clinic services or theory instruction to fewer than 15 students. The new rules also establish standards for a cosmetology school to teach only a single course curriculum.

Commentary. Under the new rules schools that teach only one course of study for nail technology, esthetics, or electrology must have a minimum floor space of 1,000 square feet and, when the enrollment in a school exceeds 10 students, additional floor space of 30 square feet is required for each additional student enrolled in the school. Stakeholders contended this type of new, smaller school would grow in number until they are impossible to regulate. They also noted that the 1,000 square foot requirement is a significant reduction from the 3,000 square feet required for existing schools.

Action. No action taken.

PUBLIC EMPLOYMENT RELATIONS BOARD, *Fees of Neutrals,* 10/17/12 IAB, ARC 0395C, ADOPTED.

Background. This rulemaking raises the maximum rate qualified arbitrators and teacher termination adjudicators are entitled to charge from $800 per day to $1,200 per day. This rate is set by the board pursuant to Iowa Code §20.6(3). This rate has not been updated in five years, and the board believes it is less than the going market rate and insufficient to retain and attract qualified neutrals. At the committee's September meeting, some members expressed concern that the proposed rate is excessive.

Commentary. A representative of the board explained the rulemaking and noted that these costs are split equally between the two parties and that not every neutral will necessarily charge the maximum rate. Committee members asked if the increase could result in all of the neutrals raising their rates to the new maximum, given that they all currently charge the maximum of $800. The representative stated that some neutrals indicated they would remain at the current rate, while others indicated they would increase their rates by varying amounts. Committee members asked how rates are regulated in surrounding states, and the representative explained that no neighboring states have maximum rates, which has resulted in Iowa's rates being 25-50 percent below the regional market rate. The representative stated that there are currently 49 neutrals listed in Iowa. Committee members asked what the qualifications are to be a neutral. The representative explained that the qualifications are not listed in the Administrative Code, but include education requirements, relevant knowledge and skills, a minimum number of years of experience or decisions or awards issued, and submission of a writing sample. A training program is also available as needed.

Action. No action taken.

REVENUE DEPARTMENT, *Certain Inputs Used in Taxable Vehicle Wash and Wax Services,* 10/17/12 IAB, ARC 0403C, ADOPTED.

Background. This rulemaking implements 2012 Iowa Acts, ch 1121 (SF 2342), §13, which provides for the taxability of certain inputs used in taxable vehicle wash and wax services. Under this new rule, for bills received on or after May 25, 2012, sales of water, electricity, chemicals, solvents, sorbents, or reagents to a retailer to be used in providing a service that includes a vehicle wash and wax that is subject to Iowa Code §423.2(6) are exempt from tax.

Commentary. After a department representative explained this rulemaking which implements a tax exemption for car

(Administrative Rules Review Committee continued from Page 4)

washes, committee members expressed concern about the proposed definition of "secondary vehicle wash and wax facility". The definition provides that a facility which has a primary purpose other than vehicle wash and wax services, but which also provides such services, will only receive an exemption for electricity and water used to provide those services. The rule places the burden on a facility to prove it is not a secondary vehicle wash and wax facility. Committee members asked what kind of proof would satisfy the rule and where such proof would be submitted. The representative was unsure and said the department would work with the industry to implement this standard. Committee members also expressed concern as to how this rule would affect a facility while selling minor incidental goods such as through a vending machine. A motion was made to refer the rulemaking to the General Assembly for further consideration. The motion carried.

Action. General referral.

Next Meeting. The next regular committee meeting will be held in Statehouse Room 116, on Tuesday, December 11, 2012, beginning at 9:00 a.m.

Secretary ex officio: Stephanie Hoff, Administrative Code Editor, (515) 281-3355.

LSA Staff: Joe Royce, LSA Counsel, (515) 281-3084; Jack Ewing, LSA Counsel, (515) 281-6048.

Internet Page: https://www.legis.iowa.gov/Schedules/committee.aspx?GA=84&CID=53

LEGAL UPDATE

Purpose. A legal update briefing is intended to inform legislators, legislative staff, and other persons interested in legislative affairs of recent court decisions, Attorney General opinions, regulatory actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. As with other written work of the nonpartisan Legislative Services Agency, although this briefing may identify issues for consideration by the General Assembly, nothing contained in it should be interpreted as advocating a particular course of action.

LEGAL UPDATE—ADVANCE RATEMAKING PRINCIPLES—WIND ENERGY APPLICATION

Filed by the Iowa Supreme Court
June 8, 2012

NextEra Energy Resources v. Iowa Utilities Board et al.

No. 10-2080

http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20120608/10-2080.pdf

Background. MidAmerican Energy Company (MidAmerican) filed an application with the Iowa Utilities Board (Board) for advance ratemaking principles applicable to the construction of a wind energy project involving the generation of up to 1,001 megawatts of wind energy. MidAmerican had previously applied for and received approval of ratemaking principles for six smaller wind energy projects. MidAmerican entered into a stipulation and agreement with the Office of Consumer Advocate prior to filing the application, and identified the following factors favoring expansion of its wind power generating capacity: the state's encouragement of renewable energy generation, positive experiences with prior wind energy projects, advantages to utility customers, favorable market conditions regarding turbine pricing, a projection that the project would pay for itself thereby mitigating a need to increase utility rates in the future, the likelihood of future carbon legislation at the federal level, and the company's goal of increasing energy source diversity. NextEra Energy Resources LLC (NextEra), an independent wholesale energy producer, filed a petition to intervene and objected to the stipulation, contending that ratemaking principles should not be applied. NextEra argued that MidAmerican was pursuing the proposed project as a vehicle to increase its presence in the wholesale energy market and that applying ratemaking principles would provide the company with a competitive advantage in that market while putting ratepaying customers at risk. The Board granted advance ratemaking principles for the project, which was affirmed by the district court.

Issues:

1. Whether statutory authority governing the application of advance ratemaking principles and alternate energy production was correctly interpreted and applied, and whether the Board's determinations in that regard was supported by substantial evidence.

(Legal Update—Advance Ratemaking Principles—Wind Energy Application continued from Page 5)

2. Whether the application of statutory authority governing advance ratemaking principles to a utility that may compete in the wholesale energy market violates the Equal Protection Clause of the United States or Iowa Constitution.

3. Whether the application of statutory authority governing advance ratemaking principles to a utility that may compete in the wholesale energy market violates the Commerce Clause of the United States Constitution.

Analysis: Interpretation and application of statutory authority.

Iowa Code §476.53 requires the board to specify in advance applicable ratemaking principles when the costs of a proposed electric generating facility by a rate-regulated public utility are to be included in rates charged to customers. Prior to this determination, the Iowa Code section requires an applicant to demonstrate that the proposed facility is a reasonable alternative to meet its electric supply needs in comparison to other feasible sources of alternative energy. NextEra contended this requirement necessitates a determination by the Board that the utility's ratepayers "need" the electrical supply the proposed project will generate. The Court interpreted the requirement more broadly to encompass not only present capacity needs, but also compliance with present and future federal regulations, fuel diversity, the supply of less expensive energy to consumers, and the promotion of economic development and the state's energy policy. The Court thus concluded that the board had properly construed the requirement.

NextEra also contended that in determining whether a proposed facility is a "reasonable" alternative in comparison to other feasible alternative energy sources, the Board should have required MidAmerican to compare the proposal to other generating facilities utilizing the same power source, and that the comparison should be performed prior to submission of the application instead of afterward. The Court disagreed, finding that the statute requires a utility to do no more than demonstrate the proposed facility is reasonable in comparison to other alternative sources for long-term electric supply, and that a utility is only required to perform a comparison prior to receiving approval of ratemaking principles.

The Court determined that substantial evidence supported the Board's findings relating to both the "need" and "other feasible alternatives" requirements. The Court additionally supported the Board's determination that the provisions of Iowa Code §476.43, relating to the ownership, purchase, and supplemental provision of alternate energy production facilities, was inapplicable due to a statutory exception contained in Iowa Code §476.44, which MidAmerican satisfied.

Equal Protection Clause. NextEra asserted that applying the advance ratemaking principles of Iowa Code §476.53 to facilitate a wholesale market endeavor violated the Equal Protection Clause at both the federal and state levels. The Court applied the rational basis test, under which a statute will be upheld if classifications drawn therein can be regarded as reasonable in light of their purpose. The Court determined that permitting rate-regulated public utilities to receive approval of advance ratemaking principles and to sell energy in the wholesale market is consistent with the legislative intent of Iowa Code §476.53, identified as mandating that "public utilities are to furnish electricity in an efficient, reliable manner" and that "(t)his implies [that] a public utility should strive to decrease the cost at which it supplies electricity to consumers while at the same time ensuring reliable service." The Court stated that "(t)he record establishes selling energy in the wholesale market allows MidAmerican to reduce rates at which its retail customers purchase energy," and that the proposed project "allows MidAmerican to meet the needs of its retail customers, which include maintaining a diverse fuel supply and acting in compliance with environmental regulations."

Additionally, it was recognized that "the general assembly was forced to limit its grant of advance ratemaking principles to rate-regulated utilities because they were the only companies subject to the State's ratemaking jurisdiction. Companies that did not provide energy to retail consumers in Iowa, like NextEra, were and still are, completely beyond the State's ratemaking influence. Such a difference is reasonable and consistent with the constitutional guarantee of equal protection."

Commerce Clause. NextEra contended that approving the application of advance ratemaking principles to MidAmerican in this instance favored in-state economic interests because an Iowa public utility operating in the wholesale market would derive a benefit that other energy providers in that market which do not serve retail customers in this state cannot obtain. The Court disagreed, stating that "(t)he Board's decision to grant advance ratemaking principles to MidAmerican does not affect NextEra or favor in-state economic interests. The Board's decision is entirely based on the fact MidAmerican is a rate-regulated utility in Iowa. The impact, or lack thereof, on NextEra would be the same if NextEra was located wholly within Iowa or completely outside Iowa because NextEra is not a rate-regulated Iowa utility." NextEra also contended that if energy generated by the project was placed in the wholesale market by MidAmerican, interstate commerce could be indirectly affected because that state-subsidized electricity would be directly competing with nonsubsidized electricity produced by NextEra and similar companies. The Court determined that "the burden on the wholesale market, if any, would be minimal" based on the proportion of energy to be produced by the project in

(Legal Update—Advance Ratemaking Principles—Wind Energy Application continued from Page 6)

comparison to the electric generation capacity in the energy market in which MidAmerican competes, and that the local benefits of the project would be significant.

Holding. The Court affirmed the judgment of the district court.

Concurrence (Special). Justice Edward Mansfield concurred in the result only, taking exception to, among other aspects of the majority opinion, a preliminary scope of review determination by the majority concluding that the General Assembly did not delegate to the board interpretive authority with the binding force of law with respect to interpreting specific terms in Iowa Code chapter 476, requiring the court to examine the Board's interpretation of Iowa Code §476.53 for the correction of errors at law. Justice Mansfield stated that "(h)istorically we have deferred to the Iowa Utilities Board's interpretations of §476.53 of the Iowa Code", citing a provision in Iowa Code §476.2 granting the board "broad general powers to effect the purposes of this chapter," and a previous decision recognizing the Board's interpretive authority.

LSA Monitor: Richard Nelson, Legislative Services Agency, Legal Services Division, (515) 242-5822.

LEGAL UPDATE—PUBLIC RELEASE OF EDUCATIONAL RECORDS—IOWA AND FEDERAL OPEN RECORDS LAW

Filed by the Iowa Supreme Court
July 13, 2012

Press-Citizen Company, Inc., v. University of Iowa

No. 09-1612

http://www.iowacourts.gov/Supreme_Court/Recent_Opinions/20120713/09-1612.pdf

Background and Procedure. The underlying sexual assault incident upon which this open records lawsuit is based occurred in October 2007 and involved students at the University of Iowa (University). Approximately one month after the incident, the Iowa City Press-Citizen (Press-Citizen) requested the University to produce certain reports, correspondence, e-mails, memos, and other University records relating to actual or attempted sexual assault incidents at the University in October 2007. The University originally produced only 18 pages of documents and claimed that other related documents were confidential records under Iowa's Open Records Act (Iowa Code chapter 22) and not subject to disclosure. The Press-Citizen subsequently filed a lawsuit in district court and a motion to compel the University to produce the requested documents. The district court granted the motion. The University produced 950 pages of documents and prepared a descriptive index (Vaughn index) of over 3,000 documents, which were submitted to the court for an *in camera* review. Upon review, the court entered an order dividing the 3,000 documents into five categories and further ordered the University to disclose certain documents not protected as confidential and subject to disclosure without any redactions (category 3 documents) and certain documents that are confidential and should be released, with student-identifying information redacted (category 4 documents). The University appealed the district court's order with respect to some of the category 3 documents and with respect to all of the category 4 documents.

Issue. Whether student confidentiality provisions of the federal Family Educational Rights and Privacy Act (FERPA) supercede the general disclosure requirements of government records under Iowa Code chapter 22, requiring the appealed category 3 and category 4 documents to be kept confidential.

Arguments and Analysis.

Iowa's Open Records Act and FERPA. In a divided 4-3 decision, the majority noted that the case "requires us to decide where disclosure ends and where confidentiality begins" under Iowa Code chapter 22 and FERPA. Iowa Code §22.2(1) generally requires "state and local entities" (defined as government bodies in the Act) to provide public access to their records. The University of Iowa, a state entity, is subject to Iowa Code chapter 22. Although the Act contains several exceptions to this general requirement of disclosure, the Court noted that the University did not base its argument on any of those statutory exceptions. Instead, the University argued that disclosure under Iowa law of the appealed documents is superceded by the federal confidentiality requirements of FERPA, and that the appealed University documents must therefore be kept confidential. FERPA was enacted by Congress in 1974 "under its spending power to condition the receipt of federal funds on certain requirements relating to the access and disclosure of student educational records" (citation omitted). Under FERPA, federal funding is not available to any educational institution or agency if it has a "policy or practice" of allowing the release of educational records or of allowing the release of personally identifiable information contained in educational records without the proper consent. The Press-Citizen argued that FERPA

(Legal Update—Public Release of Educational Records—Iowa and Federal Open Records Law continued from Page 7)

is merely a funding provision and not a "positive law" (meant to regulate certain behavior) and that FERPA does not prohibit disclosure of student educational records under Iowa Code chapter 22.

Iowa Code §22.9. While noting that "state and federal courts are sharply divided" on the issue of how to characterize FERPA confidentiality provisions and whether such provisions can supersede state open records laws, the Court declined to resolve the conflict and instead focused its analysis on a provision in the Iowa Open Records Act that "already gives priority to FERPA", Iowa Code §22.9. That Iowa Code section provides the following:

> *If it is determined that any provision of this chapter would cause the denial of funds, services or essential information from the United States government which would otherwise definitely be available to an agency of this state, such provision shall be suspended as to such agency, but only to the extent necessary to prevent denial of such funds, services, or essential information.*
>
> *An agency within the meaning of section 17A.2, subsection 1, shall adopt as a rule, in each situation where this section is believed applicable, its determination identifying those particular provisions of this chapter that must be waived in the circumstances to prevent the denial of federal funds, services, or information.*

Under the first paragraph of Iowa Code §22.9, any provision of the Iowa Open Records Act that would cause the denial of federal funds to a state agency "shall be suspended." The Court opined that, if the University regularly released educational records pursuant to Iowa Code §22.2(1), the University would be engaging in a "practice" of allowing the release of confidential educational records, assuming the records contained personally identifiable student information. The sanction for this "practice" would be a loss of federal funding. The Court interpreted the "policy or practice" requirement under FERPA broadly, rejecting the Press-Citizen's arguments that the University had failed to show that the disclosure of such records in this one particular case would "definitely" cause the University to lose federal funding and that a one-time production of records in this particular case does not amount to a "policy or practice."

The Court also dismissed the Press-Citizen's argument that the second paragraph of Iowa Code §22.9 required the University to adopt a rule identifying those particular provisions of the Iowa Open Records Act that must be waived to prevent the denial of federal funds, and because of this failure to adopt a rule, the first paragraph of Iowa Code §22.9 was rendered ineffective and inapplicable. The Court determined that the paragraphs are not interrelated as the first paragraph was enacted in 1967, is written in the passive voice, and is directed at a general audience, while the second paragraph was enacted 17 years later in 1984 and is directed specifically to state agencies. The Court noted that "there is no indication that if an agency should fail to adopt a rule under the second paragraph…that the legislature intended the first paragraph to have no effect." The Court concluded that Iowa Code §22.9 "incorporates confidentiality obligations from FERPA."

Redaction. The Court also considered whether the confidentiality requirements under FERPA can be met by redacting certain student information in an educational record or whether the entire educational record must be withheld. The University argued that under regulations adopted by the United States Department of Education interpreting "personally identifiable information," an educational record must be withheld in its entirety if such information would allow a reasonable person to know who the student was, even with redactions. In this case, there was a great amount of publicity surrounding the incident and the University argued that no amount of redaction could prevent the Press-Citizen from knowing the identity of the students involved in the incident. The Court agreed and found that, consistent with current federal regulations, the educational records may be withheld in their entirety in situations where the requester would otherwise know the identity of the student even with redactions.

Court Order or Subpoena Exception. Finally, the Court considered whether an exception contained in FERPA that provides that educational records disclosed pursuant to a court order or a subpoena may be released upon the condition that parents and students are notified prior to the issuance of the order or subpoena. The Court noted that this exception has been applied only in cases where the records are relevant to the issues raised in the lawsuit and did not involve the records themselves. The Court ruled that the "judicial order" exception cannot authorize disclosure whenever a party choses to bring a separate court action seeking access to educational records, effectively making FERPA applicable only until the party requesting the educational records chooses to go to court.

Holding. The Court reversed the judgment of the district court relating to the disclosure of the records that were the subject of the appeal in this case, finding that the University was not required to release such records.

Dissent. The dissent noted that compliance with a judicial order pursuant to a generally applicable state public records statute does not amount to a policy or practice of any educational agency or institution that would subject the University to a loss of federal funding under FERPA. The dissent failed to find a conflict between FERPA and Iowa Code chapter 22, and would have required the educational records at issue in the case be disclosed.

LSA Monitor: Rachele Hjelmaas, Legislative Services Agency, Legal Division, (515) 281-8127.